U.S. Department of Labor

Board of Alien Labor Certification Appeals
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'Notice: This is an electronic bench opinion which has not been verified as official'

Date: February 23, 2000
Case No.: **1999 INA 278**

In the Matter of:

SAINT ANTHONY CATHOLIC CHURCH, Employer,

on behalf of

INGRID SCHAERER, Alien

Certifying Officer: Hon. R. E. Panati, Region III
Appearance: Silverio Coy, Esq., of Falls Church, Virginia, for Employer and Alien.

Before : Huddleston, Jarvis, and Neusner
Administrative Law Judges

FREDERICK D. NEUSNER
Administrative Law Judge

DECISION AND ORDER

This case arose from the labor certification application that SAINT ANTHONY CATHOLIC CHURCH ("Employer") filed on behalf of INGRID SCHAERER ("Alien"), under § 212(a) (5)(A) of the Immigration and Nationality Act, as amended, 8 U.S.C. § 1182(a)(5)(A) (the Act), and the regulations promulgated thereunder, 20 CFR Part 656. The Certifying Officer ("CO") of the U.S. Department of Labor at Philadelphia, Pennsylvania, denied the application, and the Employer requested review pursuant to 20 CFR § 656.26.[1]

Under § 212(a)(5) of the Act, as amended, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor is ineligible for labor certification unless the

[1]The following decision is based on the record upon which the CO denied certification and the Employer's request for review, as contained in an Appeal File (AF), and any written argument of the parties. 20 CFR § 656.27(c). Administrative notice is taken of the Dictionary of Occupational Titles, published by the Employment and Training Administration of the U. S. Department of Labor.

Secretary of Labor has determined and certified to the Secretary of State and Attorney General that, at the time of application for a visa and admission into the United States and at the place where the alien is to perform the work that (1) there are not sufficient workers in the United States who are able, willing, qualified, and available; and (2) the employment of the alien will not adversely affect the wages and working conditions of United States workers similarly employed.[2]

STATEMENT OF THE CASE

On March 4, 1997, the Employer applied for alien employment certification on behalf of the Alien to fill the position of "Bilingual Secretary" in its religious institution. The job was classified as a "Secretary" under DOT Occupational Code No. 201.362-030.[3] Employer described the Job Duties as follows:

Bilingual Secretary/English/Spanish: perform a variety of bilingual secretarial duties including (but not limited to) answering phones, making appointments, giving information, do filing, prepare sacramental documentation, take dictation and relieve offices of clerical work. Duties also include translation from English to Spanish and Spanish to English. Worker must greet and respond to needs of individuals coming to office, either with information or referring them to the appropriate staff member. Under all circumstances, worker must be able to maintain a gracious and welcome attitude. Proficiency in computer programs such as Word Perfect for Windows, Microsoft Word for Windows, and the Parish Data System are essential.
AF 142, box 13.[4] This was a forty hour a week job from 9:00 AM to 5:00 PM, at $9.50 per hour with provision for overtime at $19 per hour. *Id.*, boxes 10 -12. The education required was high

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[2]Alien labor certification is governed by section 212(a)(5)(A) of the Immigration and Naturalization Act, 8 U.S.C. § 1182(a)(5)(A) and 20 C.F.R. Part 656.

[3]201.362-030 **SECRETARY** (clerical) alternate titles: secretarial stenographer. Schedules appointments, gives information to callers, takes dictation, and otherwise relieves officials of clerical work and minor administrative and business detail: Reads and routes incoming mail. Locates and attaches appropriate file to correspondence to be answered by employer. Takes dictation in shorthand or by machine [STENOTYPE OPERATOR (clerical) 202.362-022] and transcribes notes on typewriter, or transcribes from voice recordings [TRANSCRIBING-MACHINE OPERATOR (clerical) 202.362-058] Composes and types routine correspondence. Files correspondence and other records. Answers telephone and gives information to callers or routes call to appropriate official and places outgoing calls. Schedules appointments for employer. Greets visitors, ascertains nature of business, and conducts visitors to employer or appropriate person. May not take dictation. May arrange travel schedule and reservations. May compile and type statistical reports. May oversee clerical workers. May keep personnel records [PERSONNEL CLERK (clerical) 209.362-026]. May record minutes of staff meetings. May make copies of correspondence or other printed matter, using copying or duplication machine. May prepare outgoing mail, using postage-metering machine. May prepare notes, correspondence, and reports, using work processor or computer terminal. *GOE: 01.03.01 STRENGTH: L GED: R4 M2 L4 SVP: 6 DLU:77.*

[4] A national of Paraguay, the Alien was born 1971 and earned an Associate in Science degree in 1996. She was hired by the Employer as "Bilingual/Receptionist/Secretary" in July 1, 1994, working part time until December 1996 at twenty hours per week. Thereafter she worked forty hours a week until the date of application. This is the only employment experience the Alien listed. Her statement of qualifications indicated that she was unlawfully living and working in the United States without permission of a visa at the time of this application. AF 171-172.

school graduation with no training and no work experience. Employer's Other Special Requirements were that the worker be "Bilingual: English/Spanish" and have "No criminal record." *Id*., boxes 14-15. delete the unduly restrictive requirement by

Notice of Findings. On December 2, 1998, the Certifying Officer ("CO") issued a Notice of Findings ("NOF"), proposing to deny certification, subject to rebuttal by the Employer. AF 123-126. The NOF cited 20 CFR §§ 656.20(c)(2), 656.20(g), 656.20(g)(3), 656.21(g)(4), 656.21(b)(5), and 656.21(b)(2), and identified the following deficiencies in the Employer's Application: (1) Employer's minimum job requirements were reduced by the Alien's work history, which indicated that she had not been employed and did not possess the academic degree originally required when the Employer hired her to work in the Job Offered in July 1994. The NOF concluded that she had met the job requirements of training and /or experience while working for the Employer. Employer was required to show that the Alien did have the requisite qualifications at the time of application and hiring, or it must delete these hiring criteria from its Application. (2) The Employer's requirement of an Associate in Arts degree with no specialty was unduly restrictive in that they exceeded the normal requirements for the occupation of Secretary in the United States. Employer was required to establish the business necessity of this educational requirement (a) by explaining how the academic degree can qualify a job applicant to be a Secretary, how the degree was "substantially equivalent to the training needed for a position as a Secretary, and why work experience in this occupation was not acceptable as qualifying, and (b) by providing a detailed description of the qualifications of all the secretaries it had hired in the previous five years. In the alternative the Employer was told to amend the Application by deleting the unduly restrictive job requirement from its Application. (3) The NOF said the hourly wage that the Employer offered at $9.50 per hour was below the prevailing wage. Employer was told either to submit countervailing evidence that the occupation was not subject to a wage determination under the McNamara-O'Hara Service Contract Act (SCA) or to increase the salary offer to the level required by law by amending the Application. (4) As the Employer's posting of noticed of this position did not meet the regulatory requirements indicated supra in (1) and (3), the NOF required the posting of a new notice in addition to readvertising the job offer as amended subject to the correction of the deficiencies noted.

Rebuttal. On July 21, 1997, the Employer amended the Application by deleting the job requirements for college attendance and a college degree of any kind, computer or any other training, and all work experience. It did not eliminate Employer's specification that the worker be bilingual in English and Spanish, however, or its requirement for "Proficiency in computer programs such as Word Perfect for Windows, Microsoft Word for Windows, and the Parish Data System," all of which Employer's Application still said "are essential" on January 7, 1999, when the NOF was issued, and on February 10, 1999, when the rebuttal was filed. AF 76-120, 169. Employer's rebuttal consisted of a statement of position by counsel, a copy of the Alien's academic degree and student grade reports, a copy of the certificate designating the Alien as a notary public for the State of Virginia, a letter certifying that the Alien had completed an internship program for the Organization of American States, a statement by the pastor of the Employer justifying the salary it offered for the job, letters by other Catholic churches describing

the work and hourly rates they were paying for similar same positions, data apparently describing the national backgrounds of the members of a parish, at the time the NOF was issued, photocopies of pages containing job offers for secretaries, and a copy of the Employer's posted notice, dated October 7, 1997. Counsel argued that the position does not fall under the McNamara-O'Hara Service Contract Act or was not bound by the prevailing wage. The Employer argued that its wage survey among Catholic churches located in the Northern Virginia area indicated a salary that fell "within less than 5% of the average wage paid by similar employers to persons similarly employed."
The Employer also relied on an average of the wages indicated by unidentified advertisers in the newspapers whose classified advertisements it attached to its rebuttal.

Final Determination. On April 8, 1999, the Certifying Officer ("CO") issued a Final Determination in which certification was denied. AF 72-75. Addressing Employer's failure to offer the prevailing wage, as determined under the McNamara-O'Hara Service Contract Act, the CO rejected the arguments and proof offered in the rebuttal, which appeared to be based on holdings in **Tuskegee University**, 87 INA 5611 (1988)(*en banc*), which had been overruled by BALCA, observing that its argument relying on the average wage based on the nature of the Employer was not persuasive for this reason. The CO said, .

> In your rebuttal you state that the position of Secretary does not fall under the McNamara-O'Hara Service Contract Act (SCA), or in the alternative, the wage determination source under the SCA used jobs that are not substantially comparable, or the jobs do not require substantially similar level of skills. Additionally, you add that the Certifying Officer did not provide in the Notice of Findings relevant portions of the source for determination and a reasonable explanation of how the wage was determined. As evidence and arguments in support thereof, the employer (1) argues the NOF lacked sufficient evidence to rebut the findings as to prevailing wages, and (2) that the employer conducted a wage-survey within the Catholic Churches (4 Catholic Churches surveyed) located in the Northern Virginia Area, the area of intended employment, with persons similarly employed. Based on this survey, the average annual salary for the position of Secretary/Receptionist is $17,286.50 per year.

The CO rejected Employer's rebuttal, pointing out that the Employer should have requested the additional information it now says it required, and that its counsel should be familiar with the SCA. More particularly, the Employer's survey was rejected, as it was based on the nature of the employer, *i.e.*, Catholic churches. As the Employer failed to establish that the prevailing wage determination was incorrect, certification was denied, based on deficiencies cited under 20 CFR §§ 656.20(c)(2), 656.20(g), and 656.21(g)(4).

Appeal. On May 12, 1999, the Employer requested that the CO reconsider the denial of certification. On May 25, 1999, the CO denied reconsideration, citing **Harry Tancredi**, 88 INA 441 (Dec. 1, 1988)(*en banc*), which holds that motions for reconsideration will be entertained only with respect to issues which could not have been addressed in the rebuttal. The Employer appealed on June 25, 1999, and added documents to its appeal on July 6, 1999. The Employer's

additions also included new documents that were not included in the rebuttal,and which appear in the Appellate File at AF 14-23.

DISCUSSION

New evidence. Before discussing the issue referred in this appeal, the Panel notes first that the Employer submitted new evidence with the Motion for Reconsideration and with the Appeal. Because that newly proffered evidence was not part of the rebuttal considered by the CO, the new documents were not part of the record upon which the CO relied in denying the Application for certification. 20 CFR §§ 656.26(b)(4) and 656.27(c). It is well established that a CO may deny a timely motion for reconsideration of a Final Decision because it is based on new evidence that should have been presented as part of the employer's rebuttal to the NOF. **Royal Antique Rugs, Inc.**, 90 INA 529 (Oct. 30, 1991). Moreover, the CO was not required to accept the validity of the "new evidence" that Employer submitted with its Motion for Reconsideration and appeal. **Harry Tancredi**, (*supra*).

Prevailing wage. The NOF found that the hourly wage offer of $13.50 was below the prevailing wage of $13.22 per hour under 20 CFR §§ 656.20(c)(2), 656.20(g), and 656.21(g)(4). The NOF notified the Employer that it could rebut this finding by increasing its hourly wage offer to the level of the prevailing rate or, in the alternative, by submitting countervailing evidence that the CO's prevailing wage determination was in error. The rebuttal did not present persuasive evidence that challenged the CO's prevailing wage determination.

The Secretary of Labor expressly provided the process to be followed by the U. S. Department of Labor in determining the prevailing wage for labor certification purposes by adopting 20 CFR §§ 656.20(c) [5] and 656.40.[6] The Employer failed to comply with 20 CFR § 656.20(c) by establishing the amount of the correct prevailing wage for the reasons that follow. It

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[5] 20 CFR § 656.20(c) Job offers filed on behalf of aliens on the *Application for Alien Employment Certification* form must clearly show that: ... (2) The wage offered equals or exceeds the prevailing wage determined pursuant to §656.40, and the wage the employer will pay to the alien when the alien begins work will equal or exceed the prevailing wage which is applicable at the time the alien begins work;

[6] 20 CFR § 656.40 Determination of prevailing wage for labor certification purposes. (a) Whether the wage or salary stated in a labor certification application involving a job offer equals the prevailing wage as required by §656.21(b)(3), shall be determined as follows: ... (2) If the job opportunity is in an occupation which is not covered by a prevailing wage determined under the Davis-Bacon Act or the McNamara-O'Hara Service Contract Act, the prevailing wage for labor certification purposes shall be: (i) The average rate of wages, that is, the rate of wages to be determined, to the extent feasible, by adding the wage paid to workers similarly employed in the area of intended employment and dividing the total by the number of such workers. Since it is not always feasible to determine such an average rate of wages with exact precision, the wage set forth in the application shall be considered as meeting the prevailing wage standard if it is within 5 percent of the average rate of wages; or (ii) If the job opportunity is covered by a union contract which was negotiated at arms-length between a union and the employer, the wage rate set forth in the union contract shall be considered as not adversely affecting the wages of U.S. workers similarly employed, that is, it shall be considered the "prevailing wage" for labor certification purposes.

is well established that when challenging a CO's prevailing wage determination, an employer bears the burden of proving both that (1) the CO's finding of the prevailing wage was in error and (2) that the employer's wage offer was at or above the correct prevailing wage. **PPX Enterprises, Inc.**, 88 INA 025)(May 31, 1989)(*en banc*); **Sun Valley Co.**, 90 INA 391 (Jan. 6, 1992). For these reasons, it is elementary that an employer challenging the CO's occupational classification must submit its own wage survey to establish the elements of proof under 20 CFR §§ 656.20(c) and 656.40. In this case, however, neither the rebuttal nor the appeal fully addressed the NOF finding that the Employer failed to offer the prevailing wage under 20 CFR § 656.20(c)(2), as it offered no persuasive wage survey or other authoritative evidence challenging the amount of the CO's prevailing wage determination. **Sun Valley Co.**, *supra*. In this context, the Panel observes that the issue under 20 CFR § 656.40 is the occupation and not the employer. **Brad Bartholomay, Jr., Landscape Design and Consultation**, 88 INA 332 (May 31, 1989)(*en banc*). The analysis must focus on the totality of the job opportunity examined. **Tuskegee University**, 87 INA 561 (Feb. 23, 1988)(*en banc*). The CO cannot simply consider the nature of the employer or the employer's business, but must also consider the skills and necessary knowledge that are required for performance of the Job Offered. **Columbus Hospital**. 95 INA 282 (April 16, 1996); also see **Hathaway Childrens Service**, 91 INA 388 (Feb. 4, 1994)(*en banc*), which reversed **Tuskegee University** in part.

Summary. 20 CFR § 656.25(e) provides that the employer's rebuttal evidence must traverse all of the deficiencies stated in the Notice of Finding.[7] As Employer's wage survey was limited to four Catholic churches and did not consider the wages generally paid for the work of a Secretary in the area of intended employment, the CO's rejection of the Employer's rebuttal was supported by the evidence of record. **Hathaway Childrens Service**, *supra*. For these reasons the CO correctly concluded that the hourly wage rate that the Employer offered violated the regulations cited in the NOF and certification should be denied for the reasons stated in the Final Determination. Accordingly, the following order will enter.

[7]The Board has definitively held that all findings that are not rebutted are deemed admitted. **Belha Corp.**, 88 INA 024 (May 5, 1989)(*en banc*); **Boris Shmulevich**, 95 INA 019 (Aug. 16, 1996); **Anjan S. Sura**, 94 INA 200 (May 30, 1995). In **Reliable Mortgage Consultants**, 92 INA 321 (Aug. 4, 1993), the Board held that an employer's failure to address a deficiency noted in the NOF supported the denial of labor certification where a CO found that the employer had failed to answer the NOF finding that it had failed to offer the prevailing wage.

ORDER

The denial of certification by the Certifying Officer's denial of labor certification is affirmed.

For the panel:

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FREDERICK D. NEUSNER
Administrative Law Judge

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary unless within twenty days from the date of service a party petitions for review by the full Board. Such review is not favored and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W.
Suite 400
Washington, D.C. 20001-8002

Copies of the petition must also be served on other parties and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five double-spaced pages. Responses, if any, shall be filed within ten days of service of the petition, and shall not exceed five double-spaced pages. Upon the granting of a petition the Board may

order briefs.

BALCA VOTE SHEET

Case No.: 1999 INA 278
SAINT ANTHONY CATHOLIC CHURCH, Employer,
INGRID SCHAERER, Alien

PLEASE INITIAL THE APPROPRIATE BOX.

	CONCUR	DISSENT	COMMENT
Jarvis			
Huddleston			

Thank you,

Judge Neusner
Date: November 12, 1999